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Nos. 09-416, 09-553

IN THE

Supreme Court of the United States

GOVERNOR ARNOLD SCHWARZENEGGER, *et al.*,
Appellants,

v.

MARCIANO PLATA AND RALPH COLEMAN, *et al.*,
Appellees.

CALIFORNIA STATE REPUBLICAN LEGISLATOR INTERVENORS, *et al.*,
Appellants,

v.

MARCIANO PLATA AND RALPH COLEMAN, *et al.*,
Appellees.

Appeal from the United States District Courts for the Eastern District of California and the Northern District of California

APPELLEE INTERVENOR CALIFORNIA CORRECTIONAL PEACE OFFICERS' ASSOCIATION'S MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

Appellants and Appellant-Intervenors mischaracterize the issues on appeal. California Correctional Peace Officers' Association ("CCPOA") submits that the actual questions raised by Appellants' and Intervenors' Jurisdictional Statements are as follows, and that the answers to all of them are "no":

1. Was it improper to convene a three-judge district court to consider a "prisoner release order" under the PLRA to address uncontested, ongoing constitutional violations in California prisons when the State made recent and limited efforts that did not resolve the underlying cause of the constitutional violations, *i.e.*, overcrowding?

2. Did the three-judge district court clearly err in its factual finding that overcrowding is the "primary cause" of unconstitutional conditions in California state prisons?

3. May this Court properly review, for compliance with the PLRA's "nexus" and "narrow tailoring" requirements, an Opinion and Order that merely requires the State to propose a "Population Reduction Plan"?

CORPORATE DISCLOSURE

CCPOA is a non-profit corporation organized under the laws of the State of California. As such, it has no parent and there is no publicly-held company owning 10% or more of its stock.

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Pursuant to Rule 18.6, Appellee Intervenor California Correctional Peace Officers' Association ("CCPOA") moves to dismiss the Jurisdictional Statements filed by Appellants and Appellant-Intervenors or, in the alternative, to affirm the judgment sought to be

reviewed, on the ground that the questions on which they depend are so unsubstantial as not to warrant further review.

JURISDICTION

This Court does not have jurisdiction under 28 U.S.C. § 1253 to review the three-judge district court's Opinion and Order because it is not a final order. The lower court has merely ordered Appellants to file a "population reduction plan" for California prisons. State App. 255-256a. The lower court has not issued its final decree.

STATEMENT OF THE CASE[1]

The essence of Appellants' and Intervenors' appeals is that it is beyond the province of a federal court to tell the State to create its own solution to a conceded constitutional violation. The PLRA does not support so radical a proposition. *See* 18 U.S.C. § 3626.

Appellee Intervenor CCPOA represents the men and women who work in California state prisons: approximately 35,000 correctional officers, counselors, parole agents, medical technical assistants, and correctional sergeants and lieutenants. As peace officers, CCPOA members share the concern for public safety that compelled Congress to pass the PLRA. CCPOA intervened in this case because the extreme overcrowding in California prisons has not only caused Eighth Amendment violations, but also endangered prison staff and made it impossible for staff to fulfill their duties.

Correctional staff are the only Intervenors who daily confront these sobering realities. In granting

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[1] Appellee Intervenor CCPOA also joins in the Statement of the Case presented by Appellees.

CCPOA's motion to intervene, the district court found: "It is plain that California's prison guards are affected by the conditions of the prisons in which they work," and that CCPOA was "uniquely situated" to provide evidence regarding prison conditions. *Coleman* Docket No. 2427.

Appellants and their Intervenors overstate the differences between the State and the district court. Although various counsel for Appellants argued in the three-judge proceeding that the constitutional violations had been remedied, the State did not actually show how it remedied the Eighth Amendment violations. Nor did it ever seek to lift the special master appointment or the receivership, respectively, on the basis that the State had remedied the constitutional violations. State App. 77a. Moreover, the State never appealed the finding of unconstitutional violations in *Coleman*, and stipulated to liability in *Plata*. *See* State App. 15-16a, 31-32a. In fact, as Appellees note, the State concedes in *Plata* that the constitutional violations continue. *See* Appellee Motion to Dismiss or Affirm Appeal of State Defendants ("Appellee Mot."), at p. 10.

Indeed, the Governor himself proclaimed over three years ago, in declaring a State of Emergency under California law, that continuous and severe overcrowding in California prisons had created increasingly unsafe conditions for inmates and workers. Appellee App. 1-2a; State App. 61-62a. His Emergency Proclamation remains in effect. *See* State App. 62a. It details grave statistics evidencing that California prisons are "at or above maximum operational capacity," causing "conditions that pose substantial safety risks," including "an increased substantial risk of violence, and greater difficulty in controlling

inmate populations" and "substantial risk for transmission of infectious illnesses." Appellee App. 1-10a. The Governor concluded that "immediate action is necessary to prevent death and harm caused by California's severe prison overcrowding . . ." *Id.* at 12a.

The *Plata* and *Coleman* lawsuits sought to redress conditions closely related to what the Governor described: the prison system's failure to provide constitutionally adequate medical and mental health care. Appellees moved to convene a three-judge district court to consider a "prisoner release order" only after years of escalating orders from the two district courts failed to cure the Eighth Amendment violations because of severe overcrowding. The *Plata* and *Coleman* courts held individual and joint hearings on the matter before they convened the panel. State App. 273-274a, 289a.

The three-judge court found that correctional staff were "essential to providing healthcare to prisoners." State App. 110a, quotation and citation omitted. Among other roles, correctional officers escort prisoners to medical services within an institution, and they supervise prisoners transported elsewhere for treatment. *Ibid.* Perhaps more importantly, correctional staff are responsible for alerting medical staff when prisoners complain of acute medical issues, and are charged with observing prisoners to identify health or mental problems. *Ibid.*

But as correctional officers testified at trial, overcrowding makes it difficult to perform their roles properly—or in many instances, at all:

- Officer Brenda Gibbons testified that she observed mentally-ill prisoners being held in converted supply closets for lack of available suicide-watch beds. Trial Tr. 558-560, 575-

576. Although state prison regulations limit the time spent in such holding cells to four hours, officers are ordered to cycle inmates from those cells to another room and then back due to the lack of available beds, resulting in overnight stays. *Id.* at 575.

- Due to lack of interior space, half of the mental health programs that Officer Gibbons observes take place in the prison yards, requiring those programs to be cancelled whenever weather is poor or officers must leave to deal with emergencies. *Id.* at 566, 577.

- Inmates wait hours for medical care in chaotic and unsafe conditions. Officer Gary Benson testified that up to fifty inmates routinely wait in a fenced holding area for two to five hours, to see a doctor in a 20-foot by 35-foot "clinic." Doctors examine four to six inmates in the same tiny room, surrounded by unlocked boxes of needles, scissors, and narcotics. Officer Benson is the only officer present. Trial Tr. 592-599.

- Debra Rowlett is a correctional officer and a licensed nurse. Trial Tr. 657, 659-660. She testified that she witnessed inmates standing in lines 300 people deep to obtain their prescribed psychotropic medications. Officer Rowlett testified that inmates sometimes receive the wrong medication. Correctional staff and nurses have no time to double-check prescriptions, ask about adverse effects, or ensure that inmates consume their medication—all essential for proper medical care. Unsupervised prisoners may have their medication stolen by other inmates, or hoard it, rather

than consuming it. Officer Rowlett testified that at least one prisoner died after purposely overdosing on hoarded medication. *Id.* at 665-667.

- Correctional Sergeant Kevin Raymond works on a team responsible for prison construction and operations planning. Trial Tr. 535-536. He testified that the majority of California prisons were designed with sufficient medical space to treat a population of only one inmate per cell, yet CDCR planned to house two inmates per cell. *Id.* at 542-543. Thus almost all California prisons have less than half the space necessary to provide adequate medical care at current population levels. (But even if there were sufficient space, correctional officers testified that there are insufficient correctional officers to transport inmates to appointments or to monitor them. Trial Tr. 679, 692; *see also* State App. 110a.)

These officers' testimony made plain that adequate correctional-staff-to-inmate ratios are essential for delivery of constitutionally adequate medical and mental health services to California prisoners. The three-judge district court, however, found that "[t]he California prison system lacks sufficient custodial staff . . . to provide prisoners with timely access to [medical] care and still perform other essential [penological] functions." State App. 110a, quotation and citations omitted. The evidence established that understaffing undermines health care services, placing prisoners at substantially increased risk of further deterioration. State App. 111-112a. Despite their best efforts, overworked correctional staff are not able to respond to medical emergencies because of

"forced overtime and burnout" (State App. 111a, quotations and citations omitted), and because it is unsafe to leave hundreds of prisoners supervised by only one officer so that his or her partner can take a sick inmate to receive medical care. *Id.* at 110-111a.

Based on this and other evidence, presented over a multi-week trial, the three-judge district court concluded that overcrowding was the primary cause of the unconstitutional violations in California prisons. State App. 140-143a. After determining that no other relief would remedy the constitutional violations (*id.* at 168a), that it was the least intrusive remedy (*id.* at 168-175a), and that public safety would not be adversely affected (*id.* at 220-234a), the three-judge court ordered the State to *propose a plan* to reduce the prisoner population to 137.5% of design capacity within two years. *Id.* at 255-256a. It did not order any specific relief—much less any prisoner release—but instead allowed the State to design its own plan in the first instance. *Id.* The court outlined numerous options available to the State to comply with its order (*id.* at 192-220a), many of which the Governor himself recently proposed to the Legislature for independent budgetary reasons, including a prisoner reduction of 37,000 over two years. *See Plata* Docket No. 2269.

The State's first submitted plan did not comply with the most basic parameters of the court's order. *Plata* Docket No. 2269. Accordingly, the court rejected the State's plan on October 21, 2009, requested more information regarding the Governor's proposed plans to the Legislature, and gave the State even more time to submit a plan that did comply. *Ibid.* On November 12, the state filed its second proposed population plan. *Plata* Docket No. 2274.

Appellants' and Appellant-Intervenors' Statements of the Case

Appellants and their supporting Intervenors take substantial liberties with the record.

First, as explained above and as Appellees demonstrate in their Motion, the unconstitutional conditions are established and conceded by Appellants—not merely "alleged" (State J.S. 2; State App. 77a) and certainly not before this Court for review. The three-judge court admitted all evidence of current conditions; the State identifies no evidence that was offered but not admitted, and never made an offer of proof as to any such evidence. *See* Appellee Mot. 20-23. The three-judge court did not re-determine whether there was a continuing constitutional violation because it was neither authorized nor requested to do so. No such request came from Appellants or their Intervenors (State App. 77a), and in all events, the three-judge district court was convened under the PLRA only for the purpose of considering a "prisoner release order." *See* 18 U.S.C. § 3626(a)(3)(B).

Appellant-Intervenors in particular argue that the three-judge court should not have issued the Opinion and Order without renewed proof that the violations were ongoing. Intervenors' J.S. 8-9. Their position would result in a never-ending loop: a remedial phase lengthy enough to assure a three-judge court that no relief other than a population limit can alleviate the constitutional violations would always result in the original findings becoming "stale." The three-judge court would thus always be required to revisit the findings of unconstitutional conditions—which it has no authority to do under the PLRA (*see* 18 U.S.C. § 3626(a)(3)(A), (B))—and no relief would ever be

possible. An interpretation of the PLRA that effectively nullifies it must be rejected.

The proper forum for Appellant-Intervenors to challenge the finding of constitutional violations is before the single-judge district courts with a motion to terminate the respective actions. If those courts were to find that the constitutional violations were remedied, under the PLRA, the three-judge court's order can be modified or terminated. *See* 18 U.S.C. § 3626(b)(1), (4). Appellant-Intervenors never so moved.

Second, Appellants gloss over their non-compliance with orders issued over many years by the *Plata* and *Coleman* courts, emphasizing only the most recent orders and Appellants' attempts at compliance. State J.S. 6-9. In particular, the appointment of a Receiver in *Plata* was hardly the beginning of the story, but instead an extraordinary measure born of that court's lengthy struggle against Appellants' failures and recalcitrance. State App. 21-30a, 281a (Receivership was culminating order at the end of series of less intrusive orders that brought no meaningful change).

The State also maintains that it had no opportunity to implement Assembly Bill 900, which would have alleviated the violations. But the *Plata* and *Coleman* courts both considered the potential impact of that bill, and determined that it could proceed simultaneously with the three-judge panel's consideration of a prisoner release order, particularly since Assembly Bill 900 would take years to implement and did not sufficiently address overcrowding or understaffing. *See* State App. 283-284a (*Plata*), 299-304a (*Coleman* court: "AB 900 simply fails to address in any timely way relief from the overcrowding crisis"), 146-147a (Three-Judge Court: noting that "not a single [re-entry] facility had been constructed

under AB 900" and that "California has no plans to construct additional prisons in the near future and has not suggested that it does").

The State disputes the court's finding that overcrowding was the principal cause of the constitutional violations because there were "other causes." State J.S. 9. But the court correctly recognized that the common font of these problems was overcrowding.

Appellants claim that the Opinion and Order would cause a "statistically significant increase in crime" (State J.S. 10), but the Order only requires the State to create a plan, leaving it to the State to ameliorate the impact on public safety in the manner it sees fit given California's priorities. (State App. 174a) The only option *not* open to California is to continue its longstanding contempt for the Eighth Amendment to the United States Constitution.

Appellants also fault the court for using the 137.5% figure as the cap for California prisons but nowhere explain what is actually inappropriate about that number. State J.S. 10. Moreover, the court's order is not overbroad because it need not reach members outside the *Plata* and *Coleman* classes (*Ibid.*), since there is no "prisoner population cap" yet in place and the State may in its discretion choose to exclude non-class members. Regardless, given that the court found that a systemic approach was necessary to remedy the widespread impact of the constitutional violations and prison conditions, this is unlikely.

To the extent no order like the August 4 Order has been previously "imposed" on a State (State J.S. 2), it is because no other State has similarly refused to remedy Eighth Amendment violations when repeatedly ordered to do so. But even here, California's

resistance to compliance with the Constitution did not provoke intemperate judicial meddling, as Appellants and their Intervenors suggest. On the contrary, the three-judge court acted with great care and caution, conscious of the limitations imposed by federalism and the dignity of the State, but ultimately cognizant of their role in protecting federal rights. *See* State App. 254a ("Federal courts do not intervene in state affairs lightly. Principles of federalism, comity, and separation of powers require federal courts to refrain from addressing matters of state government in all but the most pressing of circumstances."); 156a (rejecting reliance on *Plata* Receiver as alternative remedy because "scope of intrusion by the Federal Court" would inevitably increase); 171-174a (imposing system-wide population cap because institution-specific caps intrude on "state's management of its prisons").

After closing argument at trial, the panel beseeched the State to remedy the violations on its own:

> I hope that the next time we are together it will be so that you can tell us that California's leaders have not only recognized the seriousness of the crisis, but have finally agreed to take the necessary steps to resolve it . . . [¶] If not, it will be for us, perhaps after further exploration of some of the possible remedies, to tell you how it will be resolved. [¶] I cannot possibly convey to you the depth of our reluctance to do it that way, but if you leave us no alternative, we will.

Trial Tr. 3145. Appellants indeed left the court no alternative, continuing a pattern of many years' duration.

THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

The issues raised in the Jurisdictional Statements are primarily factual disputes that are insufficiently substantial to merit plenary review. The three-judge district court's population cap order creates no conflict within the federal judiciary over the meaning of the PLRA or its application. Finally, the decision has limited precedential value because these facts are unique; they have not been and are unlikely to be repeated in other jurisdictions.

The three-judge court's findings are factual in nature and thus limited to the circumstances of this case. *See* State App. 274a and 290a (*Plata* and *Coleman* courts defining question before them as whether prior orders issued and "reasonable" time given for compliance); *id.* at 73-74a (three-judge court: is there "clear and convincing evidence" that overcrowding is the primary cause of constitutional violations); *id.* at 75-76a (narrow tailoring and public safety). As such this case does not present issues demanding nationwide uniformity. All issues that Appellants and Intervenors present for review are really challenges to the lower courts' factual determinations. This Court should decline their invitation to sift through the evidentiary record.

Nor, as explained above, does this case implicate the federalism concerns raised by Appellants or Intervenors. In the lower courts, the State was given every opportunity to comply with court orders to address undisputed violations of the Eighth Amendment, and to propose specific relief—substantial deference to a recalcitrant party, given the gravity of the violations established. The Eighth Amendment (among others) says what a state may not do under

any circumstances (*see Robinson v. California*, 370 U.S. 660 (1962) (applying Eighth Amendment to the states)), yet California has been doing some of those things for so long, without serious progress toward remedy, that the three-judge court was authorized—indeed compelled—to act.

Further, the State cites no conflict in lower courts regarding the primary issues for review even as they frame them: (A) the standards for convening a three-judge panel, (B) the meaning of the PLRA's "primary cause" standard, or (C) the PLRA's "nexus" and "narrow tailoring" requirements. *See* State J.S. 11-13. Appellants and their Intervenors cite no cases demonstrating any conflict among the lower courts regarding the application of the PLRA.

Finally, even if the issues Appellants raise might otherwise merit review, this case is not the proper vehicle because of the State's almost two-decade-long failure to comply with over 70 court orders formulated to achieve compliance with the Constitution. State App. 38a. This is an exceptional factual scenario unlikely to be repeated.

ARGUMENT

CCPOA supports affirming the three-judge district court's actions below or, in the alternative, dismissing Appellants' and Intervenors' Jurisdictional Statements.

I. NO FINAL "PRISONER RELEASE ORDER" EXISTS, AND NO ORDER REQUIRING RELEASE OF PRISONERS MAY EVER ISSUE.

Despite its inapt name and Appellants' repeated implication, a "prisoner release order" under the PLRA does not require California to fling open its prison

gates. CCPOA cedes no ground to anyone in its concern for public safety, and would not support so indiscriminate an order. Rather, a "prisoner release order" is "any order . . . that has the purpose or effect of reducing or limiting the prison population . . . ." *See* 18 U.S.C. § 3626(g)(4).

The three-judge court ordered a population cap but did not order a release of prisoners. Instead, it directed the State to submit its own plan for achieving that cap within two years. State App. 255-256a. In developing its plan, the State could "choose among many different options or combinations of options for reducing the prison population." State App. 174a. These various options were recommended not only by Appellees' experts, but also by the State's own experts, "including the Governor, CDCR officials, and the CDCR Expert Panel." State App. 249a, 174a. Accordingly, the three-judge court included them on a non-exclusive list outlining how California could comply with the Order:

- Expansion of "good time" credits allowing prisoners to earn limited early release;
- Diverting technical parole violators from prisons;
- Diverting low-risk offenders with short sentences from prisons;
- Expansion of rehabilitation programs; or
- Sentencing reform.

State App. 196-219a, 248-253a. The State's initial effort at a population-reduction plan incorporated many of these alternatives to release (*see* State App. 319-327a, 340-342a), as does its most recent proposal, filed November 12, 2009 (*see Plata* Docket No. 2274-1).

There is no imminent threat of lawlessness. The overwhelming testimony at trial supported the district court's conclusion that such population reduction measures "either have no impact on or reduce the recidivism rate" and therefore "would not adversely affect public safety." State App. 249a.

II. THE THREE-JUDGE PANEL WAS PROPERLY CONVENED BECAUSE THE *PLATA* AND *COLEMAN* COURTS' PREVIOUS ORDERS DID NOT REMEDY THE CONSTITUTIONAL VIOLATIONS EVEN THOUGH APPELLANTS HAD AMPLE TIME TO COMPLY.

CCPOA supported Appellees' efforts to convene the three-judge court because the single-judge district courts had exhausted all other means to bring the California prison system into compliance with the Eighth Amendment. Throughout the long history of *Plata* (almost 8 years) and *Coleman* (18 years), not a single prison was ever in full compliance with those courts' orders, despite specific timelines, plans, and stipulations by Appellants. State App. 17a.

This was *more* than what the PLRA required, and indeed, the single-judge district courts proceeded with exceptional caution over many years. Contrary to the State's contention, there was no rush to convene this panel. CCPOA endeavors to provide this Court with necessary context that amply justified—both legally and practically—the convening of the three-judge district court.

1. The PLRA sets forth two requirements to convene a three-judge panel: (1) the single-judge court previously entered orders for less intrusive relief that failed to remedy the violation of the federal

right; and (2) Appellants had a reasonable amount of time to comply with those orders. *See* 18 U.S.C. § 3626 (a)(3)(A), (C). No Appellants cite any conflict among lower courts in interpreting or applying the PLRA at all, let alone regarding the propriety of convening a three-judge panel. The fact is that not many courts have found need to construe these provisions, and courts that have done so, including the three-judge panel here, have had no difficulty. *See, e.g., Roberts v. County of Mahoning*, 495 F.Supp.2d 694 (N.D. Ohio 2006). There is simply no call for this Court to step in to address this issue; rather it should first allow the lower courts to develop a body of law addressing it.

Moreover, the factual determination whether the PLRA's statutory predicates are satisfied is not an issue of "jurisdiction," for the reasons outlined in Appellees' Motion. Appellee Mot. 28-36. The single-judge courts were well-positioned to make that factual determination, and they did so correctly based on the lengthy records.

2. The State failed for years to implement the *Plata* and *Coleman* courts' orders.

In *Plata*, Appellants conceded that prison conditions were unconstitutional and judicial oversight necessary under the PLRA. State App. 15-16a; *Plata* Docket No. 68, ¶29 (June 13, 2002 Stipulation and Order for Injunctive Relief, stipulating that all requirements of PLRA satisfied). Appellants utterly failed to implement meaningful reform and did not meet any of the court-imposed deadlines or timelines upon which they had agreed. State App. 17a.

The *Plata* court tried everything within reason to bring the State into compliance:

- Entered multiple orders, including reiterations of prior orders, with which the State did not comply. State App. 17-20a.
- Appointed prison experts to review conditions and report on recommendations; the experts came back with dismal progress reports month after month. *Id.*
- The district court judge even began to meet with the parties on a monthly basis to identify the impediments to reform and assist defendants in overcoming them. State App. 21a.

These efforts were all unsuccessful in persuading Appellants to comply with the policies that they themselves admitted were necessary to remedy the constitutional violations. State App. 14a ("defendants proved incapable of or unwilling to provide the stipulated relief").

After remedial efforts stalled for three years, the *Plata* court issued an order to show cause why the State should not be found in contempt and why a receiver should not be appointed to manage prison health care delivery. State App. 21-24a. The court held a six-day bench trial and found that Appellants were "unwilling or incapable of breaking out of a deeply entrenched bureaucratic mind-set, and have refused or been unable to take the steps necessary to prevent further needless loss of life and suffering among its wards." *Plata* Docket No. 371 (Oct. 3, 2005 Findings) at 37-39. Faced with an intractable situation, the *Plata* court took the extraordinary step of imposing a receivership over the California state prison medical care system. State App. 28-29a ("the

Court is simply at the end of the road with nowhere else to turn," because of "the state's abdication of responsibility," quotation and citation omitted).

Appointment of the Receiver was thus a culminating step designed to ensure compliance with court orders long ignored. The Receiver began running the prison medical system in early 2006. State App. 29-30a. But, even exercising all the powers of the CDCR Secretary related to medical care, the Receiver was unable to remedy the conditions in the prisons because of severe overcrowding. *Ibid.*

The history of *Coleman* is similarly grim. After a trial in 1995, the *Coleman* court held that the Eighth Amendment rights of mentally ill prisoners were violated due to "systemwide deficiencies in the delivery of mental health care." *Coleman v. Wilson*, 912 F. Supp. 1282, 1316 (E.D. Cal. 1995); State App. 30-36a. The court appointed a Special Master to assist Appellants' compliance with the remedial orders. State App. 36a.

For more than a decade, the *Coleman* court issued over 70 orders aimed at eliminating the shortage of beds and space for prisoners in need of psychiatric treatment. State App. 30-31a, 36-46a. The court had to issue orders repeatedly because Appellants failed to effectuate the relief required. For example, on April 17, 2006, defendants filed their third bed plan in response to the court's repeated orders. *Coleman* Docket No. 1800. It was inadequate. *Ibid.*

The *Coleman* court summarized the results of its orders: "The special master reports, the record reflects, and defendants admit, that [Appellants' remedial plan] in no way adequately respond[ed] to the severe shortage of . . . mental health crisis beds that currently exists in the CDCR." *Ibid.* That bed plan

was only the most recent incarnation of similar orders issued throughout the then-eleven year remedial phase of the case. *See also Coleman* Docket No. 3450 ("the State has no current viable bed plan [and] is uncertain as to when [one] can be developed," which the court concluded "demonstrate[s] an unacceptable lack of commitment to its constitutional duty, much less to the orders of this court"). As of the time of trial the State's non-compliance persisted. State App. 77a (noting that *Plata* and *Coleman* courts found on-going violations without objection from the State when the three-judge court convened, and that no motion to terminate under § 3626(b) of the PLRA had been filed).

Court orders to implement Appellants' own mental health program standards met a similar fate. The *Coleman* court ordered Appellants to comply with these standards in June 1997. *Coleman* Docket No. 858. The court allowed Appellants more than 10 years to comply with the standards, and even allowed Appellants to revise them in 2006 (*Coleman* Docket No. 1773), but Appellants never met many of their own standards. *See, e.g.,* Pls.' Trial Exh. P264[2]

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[2] The three-judge court ordered the parties to submit written evidentiary objections to trial exhibits. Trial Tr. 650-651; *see also id.* 635 (noting there were "thousands of objections"); Plata Docket Nos. 1973, 1975 (parties' written evidentiary objections and responses). In its 8/4/09 Order Ruling on Evidentiary Matters, the court ruled that all objections to exhibits cited in its concurrently-filed 8/4/09 Opinion and Order (the subject of these appeals) were overruled, and that it would not rule on objections to exhibits not cited in its order "as we have not relied on such evidentiary material in making our ruling." Plata Docket No. 2198.

Accordingly, per Supreme Court Rule 24.5, trial exhibits cited in this motion that were relied on in the 8/4/09 Order are

(Unmet Need Chart), *Plata* Docket No. 1973 (objection withdrawn); Defs.' Trial Exh. D1020 at 4, *Plata* Docket No. 1975 (no objection); Trial Tr. 915-916; Pls.' Trial Exh. P57 at 353, *Plata* Docket No. 1973 (objection withdrawn); *see also* Defs.' Trial Exh. D1148 at 12, cited at State App. 38, n.16.

Appellants also failed, and continue to fail, to comply with their own guidelines and court orders regarding suicide prevention. *Coleman* Docket No. 3677.

The *Plata* and *Coleman* orders failed to remedy the constitutional violations, even though the State was given every opportunity, and more-than-reasonable time, to comply. The PLRA required no more for the appointment of this three-judge court. *See* 18 U.S.C. § 3626(a)(3)(A), (C).

3. The *Plata* and *Coleman* courts even delayed deciding whether to convene the three-judge panel, to give Appellants additional time to comply. Notwithstanding years of violated orders, the *Plata* and *Coleman* courts did not rush to convene the three-judge district court under the PLRA.

The *Coleman* and *Plata* plaintiffs moved for such a proceeding in November 2006 (State App. 62-63a), but the courts delayed ruling on the motions for eight months. State App. 275-277a, 289a. Each court sought input from either the Receiver (*Plata*) or the Special Master (*Coleman*) regarding how overcrowding affected their respective ability to remedy the

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followed by a reference to that Order (indicating they were admitted), and trial exhibits for which there were no standing objections are followed by a reference to the parties' filings (indicating no objection or that withdrawn).

constitutional violations. State App. 63a. And both courts virtually begged the State to use this time to identify means to remedy the constitutional violations or the overcrowding without judicial intervention. State App. 63a, 286a, 304a (expressing "extreme reluctance" to convene three-judge panel).

The *Plata* Receiver and the *Coleman* Special Master separately reported that their efforts could not remedy the constitutional violations so long as the prisons remained overcrowded. State App. 65-69a, 281-283a (*Plata*), 295-296 (*Coleman*). In the intervening months, the State failed to take any meaningful action to remedy the violations or comply with court orders. The *Plata* and *Coleman* courts thus proceeded to request the establishment of the three-judge panel, finding that the statutory prerequisites were met. State App. 69a, 285-287a, 304a.

Both courts expressed great reluctance to issue their orders. State App. 287a, 304a. The *Plata* court in particular urged the parties to come to a mutual agreement because "[t]his Court would like nothing more than to have the three-judge court be able to enter a consent judgment without the need for a prisoner release order." State App. 287a.

Once convened, the three-judge court itself took yet another step to avoid the need for any federally-imposed remedy. It appointed one current and one former justice of the California Court of Appeal to mediate months of settlement discussions among the parties. State App. 69-70a. Only after that effort failed did the matter proceed to trial. State App. 70a.

4. This Court has no jurisdiction to review the convening of the three-judge panel because the single-judge district court orders responsible for that

were appealable directly to the court of appeals. *See, e.g., Dove v. Bumpers*, 497 F.2d 895, 896 (8th Cir. 1974) (court of appeals has jurisdiction to determine whether three-judge panel properly convened); *Mayhue's Super Liquor Store, Inc. v. Meiklejohn*, 426 F.2d 142, 144-45 (5th Cir. 1970) (same).

The State in fact appealed this issue to the Ninth Circuit Court of Appeals. *Coleman v. Schwarzenegger*, 2007 WL 2669591 (9th Cir. 2007). The Ninth Circuit concluded that the orders were not ripe for review, as no final order had issued. *Id.* Once there is a final order from the three-judge court, Appellants may again take an appeal to the Ninth Circuit Court of Appeals.

III. THIS COURT'S REVIEW IS UNNECESSARY BECAUSE THE THREE-JUDGE COURT CORRECTLY WEIGHED THE EVIDENCE ON WHETHER OVERCROWDING IN CALIFORNIA PRISONS IS THE "PRIMARY CAUSE" OF CONSTITUTIONALLY INADEQUATE MEDICAL AND MENTAL HEALTHCARE.

Appellants' and Appellant-Intervenors' Jurisdictional Statements inappropriately invite this Court to second-guess the three-judge district court's factual determination that overcrowding was the primary cause of the constitutional violations in this case. CCPOA joins in Appellees' arguments on this point as well.

The evidence amply supports the district court's extraordinarily detailed opinion finding that overcrowding is the primary cause of the unconstitutional conditions in California prisions. Evidence was taken in a two-month trial, which included former heads of

prison systems in California, Texas, Washington, Maine and Pennsylvania—most of whom had never previously testified on behalf of prisoners. State App. 80-81a. This Court has no compelling reason to review the three-judge court's finding, which was in all events correct.

1. The "primary cause" of a constitional violation is a question of fact under the PLRA. The statute provides that a "three-judge court shall enter a prisoner release order only if the court finds by clear and convincing evidence that" prison "crowding is the primary cause of the violation of a Federal right." *See* 18 U.S.C. § 3626(a)(3)(E).

"Clear and convincing" is a standard of evidentiary proof. *See Addington v. Texas*, 441 U.S. 418, 424-425 (1979) ("clear and convincing evidence" is "standard of proof" that lies "between a preponderance of the evidence and proof beyond a reasonable doubt"); *Kenyeres v. Ashcroft*, 538 U.S. 1301, 1305 (2003) (same). By incorporating it into the PLRA, Congress necessarily conveyed that this determination is factual in nature. Federal courts applying the PLRA's "primary cause" requirement have uniformly held it is a factual determination. (*See, e.g., Tyler v. Murphy*, 135 F.3d 594, 596 (8th Cir. 1998) (reversing single-judge prisoner release order because it was entered "without the requisite evidentiary hearing and mandated findings of fact" relating to "primary cause"); *Roberts v. Mahoning County*, 495 F.Supp.2d 713, 715 (N.D. Ohio 2006) (three-judge panel addressing which party has "burden of proof" to establish constitutional violations where district court convened panel *sua sponte*); *see also Guillen v. Thompson*, 2009 WL 2513494 at *5 (D. Ariz. 2009) (state-defendant arguing that prisoner release order

improper because pro se plaintiff "has not proffered any evidence or proof that overcrowding is the cause of his alleged violation," as required under PLRA). These courts generally did what the three-judge district court here did: hold or require an evidentiary hearing or trial (*cf. Tyler,* 135 F.3d at 596), or enter consent decrees (*Roberts v. Mahoning County*, 495 F. Supp. 2d 719 (N.D. Ohio 2007)). There is no serious dispute that the PLRA's "primary cause" determination requires a factual rather than legal inquiry.

Appellants' only citation to the contrary is a footnote from the three-judge district court's decision. State J.S. 9 and 18, both citing State App. 126a n.55. But there, the court addressed a different and narrower point: although "primary cause" is a question for the three-judge panel, it is allowed to consider expert opinion testimony going to "the ultimate issue" in the case. *See* State App. 126a n.55. To the extent the court stated loosely that "the primary cause issue is ultimately a question of law," that is incorrect. Causation is a factual question reviewed only for clear error. *See Miller v. Johnson*, 515 U.S. 900, 917 (1995). Moreover, the court did not hold that the entire inquiry is legal in nature, and sitting as a trial court, could not have meant any such thing. The only arguably legal issue is whether the evidence is sufficient to satisfy the "clear and convincing" standard. It is, and the State never argues in its Jurisdictional Statement that the evidence was insufficient to meet this standard.

Appellants also argue that the PLRA should be interpreted to require that overcrowding be a "but for" cause of the constitutional violation. State J.S. 20-24. This argument was not presented to the lower court and therefore waived, but in all events it is

plainly wrong. It would have been simple enough for Congress to make "proximate cause," "but for cause" or "exclusive cause" the statutory standard. Instead it selected "primary cause," a distinct and readily comprehensible phrase. *See* 18 U.S.C. § 3626(a)(3)(E)(i). The three-judge district court properly interpreted the PLRA's "primary cause" requirement, and even adopted Appellants' definition. *See* State App. 78-79a. This Court need not revisit that holding.

Neither Appellants nor Appellant-Intervenors ever hint what the "primary cause" of the constitutional violations in *Plata* and *Coleman* might be, if not the extreme and endemic overcrowding in California prisons. Instead they attempt to re-frame the question as one of legal, "but-for" causation, heedless of the PLRA's plain words.

2. The district court correctly determined that overcrowding strains existing correctional officer staffing levels, which directly impacts delivery of medical and mental care for inmates. State App. 110-112a. This finding is borne out by the testimony provided by custodial staff.

The court considered officer testimony that in some prison housing units, one or two correctional officers supervise approximately 200 inmates. State App. 111a. It found that when a prisoner medical emergency arises under these circumstances, custodial staff "can only sound the alarm, make frantic telephone or radio calls, and hope for backup." *Ibid.* For example, Officer Rowlett testified that if officers respond to a serious medical emergency (as she and her partner had to with an inmate who suffered three seizures a day), no correctional officer is available to supervise the other almost two hundred inmates, creating a safety hazard for inmates and staff. Trial

Tr. 678-680. Under these circumstances corrections officers must quickly decide whether an apparent health emergency is real, or a diversion designed to distract officers, under peril of their own safety and that of the sick inmate. State App. 111a. This is unsafe for inmates and staff.

The three-judge court also relied on evidence from the *Plata* Receiver that custodial understaffing and the State's lack of an "organizational structure and processes" for escorting prisoners to medical appointments results in "denial of timely access to health care services and substantially increases the risk that [prisoners'] health will further deteriorate." State App. 111a-112a, citations and quotations omitted. Inadequate correctional staffing "caused significant delays in treatment." State App. 112a, citation and quotation omitted. The State's own mental health expert testified that the "shortage of correctional officers statewide compared to the number of inmates impedes the delivery of mental healthcare" to the *Coleman* class. *Ibid.*, citation and quotation omitted.

After considering this and extensive other evidence, the three-judge district court concluded that "[a] reduction in the crowding of California's prisons would help ease the burden on the custodial staff and permit staff members to better monitor inmates for medical or mental health problems and to deliver inmates for necessary care." State App. 112a. As Appellees explain, the State does not deny that overcrowding strains correctional staff's ability to provide services to prisoners, including access to medical and mental healthcare. *See* Appellees' Mot. 13-17.

IV. THERE IS NO ORDER REVIEWABLE FOR COMPLIANCE WITH THE PLRA'S NEXUS AND NARROW-TAILORING REQUIREMENTS.

These appeals are premature because there is no final order for this Court to review. Dismissal is proper on this ground alone. *See* Appellees' Mot. 8-10. The three-judge court simply has not issued any order this Court can review for consistency with the PLRA's "nexus" and "narrow tailoring" requirements.

The three-judge court acted with restraint by allowing the State to submit a proposed plan, rather than ordering it outright to reduce its prison population in some judicially-selected way. It gave the State forty-five days to submit a plan that would gradually reduce the prison population to 137.5% of design capacity over two years. State App. 255-256a. True to form, Appellants submitted a plan aimed at reducing the prison population to 166% of design capacity over 5 years—which the court rejected on that ground and for multiple other failures to comply with its directive. *Plata* Docket No. 2269. The three-judge court gave the State another 21 days to comply, and the State filed a new plan on November 12, 2009. *Plata* Docket No. 2274. Only if the three-judge court determines that the State's new plan does not comply will the court develop a plan independently.

Appellants and Appellant-Intervenors argue that the order to develop a plan to reduce the prison population to 137.5% of capacity within two years is a "prisoner release order" under the PLRA. State J.S. 1-2a; Intervenors' J.S. 5. That is incorrect because the only actual injunction the court has issued is to formulate a plan for reaching that goal.

Intervenors argue that the three-judge district court should have ordered other alternatives to a population cap. Intervenors' J.S. 13. But that is not the role of a three-judge district court under the PLRA; such a panel is convened expressly for the purpose of considering a "prisoner release order." *See* 18 U.S.C. § 3626(a)(3)(B), (E). All other judicially-available remedies were already employed to no avail by the *Plata* and *Coleman* courts.

CONCLUSION

For all these reasons, this Court should dismiss the appeals and/or affirm the three-judge district court's order.

Respectfully submitted,

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